

October 13, 2005

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Re: Comments on Preliminary Draft NPDES Phase II Stormwater Permit

Hi Karen:

Please accept and consider the attached comments on the Preliminary Draft Phase II Stormwater Permit for Eastern Washington.

I appreciate the hard work you and many others have put into the permit and into working with Eastern Washington Stakeholders. While I have substantial concerns about various elements, which will be described below, I also think that the effort made by Ecology to involve stakeholders has resulted in a better draft permit than one produced with less local involvement. In addition, most Permittees are better informed and prepared for the requirements the permit will impose upon them. Hopefully this, plus several more improvements, will decrease the difficulty Ecology will have in implementing the permit and local governments will have in complying with it, although compliance will still be extremely challenging for many Permittees.

I look forward to seeing Ecology's response to these comments and the final draft permit.

Sincerely,

Otak, Incorporated

John Knutson
Senior Project Manager

JHK

General Comments

General Comment #1.

The draft permit specifies the order of BMP implementation. The draft permit also contains numerous deadlines for BMP implementation. This seems to contradict the federal intention to allow Permittees to figure out how best to implement the minimum control measures based upon local conditions (political, technical, financial), and working with side boards and expectations for the ultimate program set by permits. The type of highly prescriptive language currently in the Preliminary Draft Permit creates a couple of problems:

- (1) It takes away most flexibility in how local governments implement the overall program, removing the ability for Permittees to decide for themselves what makes sense for their citizens and conditions. In some cases, this could even result in local governments having to halt ongoing stormwater planning efforts in mid-stream and rearrange their focus to meet the permit requirements, even though they always intended to fully implement all required programs within the 5 year timeframe;
- (2) Hard and fast deadlines may create an unnecessary amount of liability for Permittees. Permittees can be diligently moving towards compliance, and intend to have all programs in place by the end of the permit term, yet they may be considered out of compliance for missing a deadline or two along the way. Ecology knows very well that some groups will actively look for opportunities to benefit from these types of “technical” non compliance situations. I would think that Permittees working hard to comply would appreciate it if Ecology helped shield them from these types of situations, rather than open the door for them.

When these points were raised at a recent stakeholder meeting, Ecology had two responses:

- (1) The “Failure to Regulate” decision combined with the need for annual compliance checks by Ecology requires this type of highly prescriptive language. I do not agree. In fact Ecology on page 18 of the 2003 report to the legislature Eastern Washington Review of NPDES Phase II Legislative Issues recognized that the 9th Circuit Court held that its decision “*should not preclude regulated parties from designing aspects of their own stormwater management programs, as contemplated under the Phase II Rule*”. Ecology apparently now disagrees. I believe that Ecology can specify the BMPs that need to be implemented in the permit without an order or intermediate deadlines, and then assess compliance annually in two ways: (a) review the Permittee’s written and published Stormwater Management Program (SWMP), and (b) review the Permittee’s NPDES Annual Reports to see that progress with BMP Implementation is being made. If the Permittee makes less progress on some BMPs early on (*perhaps because they must focus heavily on public education/involvement and obtaining funding*) but justifies why in their SWMP and Annual Report and states that they intend to aggressively implement all programs in later years so all are in place by the 5 year timeframe, then they should be able to do so without being open to non-compliance threats along the way. Another approach would be to remove the current order of BMPs and schedule from the

permit and instead use it in the fact sheet as a non-binding guide, example, or target to help Permittees plan their approach.

- (2) Stakeholders should submit to Ecology alternative orders of BMPs and deadlines and perhaps several approaches could be included in the final general permit. This is not a reasonable response. There are large number of BMPs and possible deadlines, resulting in a huge array of possible scenarios. The end result would be the same – so there would be three pathways with fixed BMP orders and deadlines rather than one – marginally better but the same concerns are still present. In addition, Ecology is drafting the permit, if Ecology believes that this issue deserves consideration and that having only one schedule and order of BMPs is a concern, then Ecology should address it, not ask stakeholders to assume this responsibility. It is likely that this issue and local realities will force some Permittees to propose their own order of BMPs and deadlines, but it will probably be in the context seeking individual permits.

General Comment #2

Ecology notes in the Preliminary Draft Fact Sheet for the permit (S5.B.4, Page 10, 3rd bullet) that “*Ecology intends to make the requirements for developers the same under both this Permit and under the Construction Stormwater General Permit*”. This should be disconcerting for NPDES Phase II Stormwater Permittees, since it would require local construction development regulatory programs to perform activities and develop capacities that were never discussed before this point, and that go well beyond what was envisioned by the EPA for local governments when the Phase II rule was established, or what was cooperatively developed in the Model Municipal Stormwater Program For Eastern Washington. Additional requirements would include things like: review and oversight of water quality monitoring activities, forced ramping up of monitoring and BMP requirements based on 303(d) listings, enforcement of certification requirements, and review of full Stormwater Pollution Prevention Plans (SP3s).

The requirements within the draft Construction Stormwater General Permit were negotiated with an array of interest groups for Ecology to implement. It does not seem appropriate for Ecology to circumvent the ongoing Eastern Washington committee process and dialog and simply increase the requirements of NPDES Phase II Permittees to implement the same requirements. At no time prior to this Draft Fact Sheet did Ecology discuss this intention with stakeholders. In fact, based on the last several years of discussions with Ecology, it was my understanding, and likely the understanding of many others, that the Model Municipal Stormwater Program for Eastern Washington would guide the development of Eastern Washington NPDES II permit requirements, not a completely different permit development process that few people in Eastern Washington had any opportunity to participate in (and those who did certainly would not have realized that the regulatory program would have to be implemented by local governments as well as, or rather than, Ecology).

It is interesting to note that the Preliminary Draft Fact Sheet in the 4th bullet on Page 10, states that Ecology intends to “*define the process for jurisdiction to become recognized as having Qualified Local Programs (QLPs)...*”. Contractors with projects with the jurisdiction of local governments with QLPs would not need to seek Construction Permit coverage from Ecology, only the local permit. If Ecology requires every city and county under NPDES Municipal Stormwater permits (well over a hundred) to implement the exact same construction regulatory program as the Construction General Permit, then it seems that every Permittee would in fact be operating a QLP (if they regulated both direct discharges and discharges into their MS4). Presumably this would greatly reduce the number of permits Ecology would have to issue and greatly reduce the administrative impact of enforcing the Construction General Permit on Ecology. Good for Ecology, but maybe not so easy for NPDES II Permittees to accomplish given the difficulty in obtaining revenue to pay for local development review programs. In any case this increases the burden of NPDES II on local governments, creating more permit implementation challenges and opportunities for liability. I suggest that Ecology stay true to the intention of the QLP approach and leave it up to Permittees to decide if they want to become one based upon their local conditions, priorities, and financial ability. Perhaps the pendulum should even swing the other way, and projects needing to seek coverage under the Statewide Construction General Permit should not have to be regulated under local programs, other than for the local agency to verify that the contractor has sought the Ecology permit. If this latter approach is not possible then keep the QLP purely discretionary and keep NPDES II Permittee requirements consistent with the federal intent and the Model Municipal Stormwater Program for Eastern Washington.

Specific Comments

Specific Comment #1 (Draft Permit, pg 7, S4.C)

The first 2 sentences of S4.C state that all new stormwater discharges must meet water quality standards. There are two concerns here:

- (1) “all” seems to include direct discharges the regulation of which by the Permittee is not supposed to be required by NPDES since the discharge is not into or from the MS4. I suggest clarifying that Permittees are not required to regulate direct discharges under the permit, or specifying the discharges that are required to be regulated more clearly;
- (2) the use of “discharges” seems to indicate that Ecology expects actual stormwater runoff to meet groundwater, surface water, and sediment quality standards which is not likely achievable even with advanced pre-treatment. Nor are water quality standards meant to apply to urban stormwater runoff itself. It seems that a better way to say this would be that *new stormwater discharges shall not contribute to a violation of groundwater, surface water, and sediment quality standards in the receiving waters*. Or otherwise clarify that stormwater runoff itself is not subject to water quality standards.

Specific Comment #2 (Draft Permit, pg 8, S5.A.2)

S5.A.2 requires the Permittee to implement their SWMP in accordance with the schedules in the Permit. It goes further and then also requires that Permittees that are already implementing any aspects of the SWMP must continue to do so. What this essentially says, is that local governments who are already implementing any activities required under the permit must continue to do so and begin implementing the other requirements in compliance with schedules in the permit. But what if the local government does not have the resources (staff, \$, time) to do this? Are they being punished for trying to get ahead of the game? Are they expected to do more in less time than others? This relates directly to my General Comment #1 about the difficulty that having hard and fast compliance dates and a specific required order of BMP implementation creates for Permittees. This is not reasonable. If a Permittee must stop one activity in order to switch to another to comply with Ecology's BMP schedules and deadlines, then they should be able to do so without being required by the permit to continue on with other activities. These other activities may have to be put on a "back burner", the local agency may have no choice, they may not have the money or staff yet to accommodate both. Ecology should understand this and as long as the "back burner" items are resumed later there should be no compliance issue. I understand Ecology's desire to see Permittees not back slide, but financial realities may dictate whether or not this happens (hopefully not most of the time). The real resolution of this issue is to avoid having so much specificity concerning the order of BMP implementation and the schedule for doing so in the permit – as long as the Permittee has a SWMP that shows that the full program will get implemented in 5 years.

Specific Comment #3 (Draft Permit, pg 18, S5.B.6.a.i)

The first paragraph of bullet i specifies that good housekeeping procedures are needed for "facilities and activities that are present within the Permittees Boundaries". This terminology can be construed to mean that counties (and other entities with jurisdiction outside the NPDES permit coverage area) must apply their good housekeeping program jurisdiction wide. Please clarify the intention of this language for counties. I suggest changing it to clearly on require programs within the defined permit coverage area (for counties – the federal Urbanized Area plus adjacent Urban Growth Areas).

Specific Comment #4 (Draft Permit, pg 19, S5.B.6.a.i, 6th, 7th, 8th sub-bullets)

Each sub-bullet, Construction Activities, Industrial Activities, Material Storage Areas, all refer to the Permittee seeking coverage under NPDES permits. In fact the language specifies that coverage under General Permits must be sought when necessary. However the Permittee should have the option to choose whether they want to seek coverage under a General Permit or an Individual Permit. They should not be forced to seek General Permit coverage. I suggest editing these sections to allow either General or Individual permit coverage to be sought when needed.

Specific Comment #5 (Draft Permit, pg 19, S5.B.6.a.i, 9th sub-bullet, flood management)

I believe that a clear explanation to Permittees regarding the purpose, applicability, and expectations of the flood management requirements is needed. I could make the argument that it only applies to

flood management projects that discharge into the MS4 (since that's what the permit is all about). However, as written, it could be construed to mean flood projects like levees along rivers which may have negative effects on sediment transport and contribute to lack of shade or poor shallow benthic invertebrate habitat, etc. While I think that these types of things deserve to be looked at over the long run, it should not be permit requirement to do so. It should be made clear that Permittees are not expected to execute major capital projects like moving Corp of Engineers levees at a cost of many millions of dollars. However, it may be reasonable for Permittees to examine "in-line" flood management wet or dry detention facilities to see if they may be impacting water quality/stream stability in the receiving waters and make relatively minor modifications to improve conditions.

Specific Comment #6 (Draft Permit, pg 20, S5.B.6.a.ii)

This section discusses the requirement to inspect treatment and flow control facilities. It may be helpful to clarify whether or not a dry well or infiltration trench is a "flow control facility", and/or when that might be the case. For instance, I've seen sites where dry wells are connected together in series along an urban arterial with a pipe extending from the last one to a river. In this case the dry wells were supposed to capture and infiltrate the design storm (they were actually totally plugged up) with the rare large storm overflowing to the river – a flow control function. I've seen the same with infiltration ponds. On the other hand, it is very common in Eastern Washington for dry wells and infiltration trenches to be isolated with little or no possibility of overflow reaching surface waters. Some clarification may be helpful here. I'd suggest that dry wells or infiltration trenches with constructed outlets/overflows to an MS4 or adjacent surface waters be considered "flow control facilities" when they would discharge to a non-exempt water body.

Specific Comment #7 (Draft Permit, pg 26, S8.B.3.b.iv)

This language seems to allow Permittees to propose and use a schedule for implementation of BMPs that is different from what is in the permit. As discussed in General Comment #1, Permittees should be able to use SWMPs with alternative scheduled as long as: (1) the schedule is reasonable and shows that the Permittee will implement the program within 5 years, and (2) the Permittee make diligent efforts to adhere to the schedule. As currently written, meeting the requirements of this subsection (documenting the status of compliance with the permit condition that certain BMPs be implemented on a set schedule) seems like it immediately creates liability for the Permittee if they indicate that they are not meeting the schedule in some way, even minor. Suggest removing hard and fast schedule and BMP implementation order as a permit requirement per my earlier comments (General Comment #1).

Specific Comment #8 (Draft Permit, Appendix 2, pg 7, Core Element #2)

As discussed under General Comment #2 above, I believe that this section should not include any provisions that go beyond the NPDES II construction regulatory program that was developed in the Model Municipal Stormwater Program for Eastern Washington. In addition, the draft of Appendix 2 in the Eastern Washington NPDES II Permit does not reflect the last draft of the Construction

Stormwater General Permit, therefore I hope that Ecology is willing to possibly make significant changes to the draft final Eastern Washington NPDES II Permit since reviewers of this Preliminary Draft Permit are not seeing an accurate Construction Stormwater section in Appendix 2. It may be necessary to include and discuss the Erosivity Waiver process here or in S5 of the body of the permit as well.

Specific Comment #9 (Draft Permit, Appendix 2, pg 11 Discussion of Construction Inspection)

The 7th line down from the top of the page discusses inspection requirements including “once every calendar week”. It should be made clear that the inspection discussed here refers to the site operator, not the NPDES II Permittee. In addition, it may be excessive to require weekly inspections in some parts of Eastern Washington where it is commonly dry for months during mid summer. Perhaps a longer period between inspections is appropriate with the requirement that inspection would also be triggered by a forecast for rain within XX hours.

Specific Comment #10 (Draft Permit, Appendix 2, pg 11, bullet c. Monitoring)

Oversight of construction monitoring should not be an NPDES II Permittee requirement. This could require specialized staff and/or training that is not reasonable to expect smaller Permittees to obtain. The language currently used refers to the “plan approval authority”. Is this intended to be the Permittee. If so I suggest changing it to clearly be Ecology unless the Permittee has opted to become a QLP, and clarify that monitoring is only required under the Construction General Permit, not the local NPDES II Permittee program, unless the local agency chooses to require it.

Specific Comment #11 (Draft Permit, Appendix 4)

The implementation schedule shown is a nice summary but it seems redundant with S5 and probably could be eliminated. In addition the schedule should only be presented as an “example” for guidance purposes when developing SWMPs. The Permittee should be free to provide alternative and equivalent schedules as long as they are reasonable (perhaps meaning prepared by a competent professional) and illustrate that the full program will be implemented in the 5 year timeframe.